No. 89-631

In the Supreme Court of the United States

OCTOBER TERM, 1989

GERALD O. PHILPOT AND MOBILE MATERIALS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sherman Act conspiracy charge in the indictment was impermissibly vague.

2. Whether petitioners' sentences violated the Eighth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A50) is reported at 871 F.2d 902. The court's opinion on rehearing (Pet. App. A53-A76) is reported at 881 F.2d 866.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1989. The opinion of the court of appeals on rehearing was entered on July 28, 1989. A suggestion for rehearing en banc was denied on July 28, 1989. Pet. App. A1-A2. By an order dated September 13, 1989, Justice White extended the time for filing a petition for a writ of certiorari to and including October 26, 1989. The petition

was filed on October 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 22, 1984, a grand jury in the Western District of Oklahoma returned a seven-count indictment against petitioner Mobile Materials, Inc. (the Corporation), Mobile Materials Company (the Partnership), and petitioner Gerald O. Philpot, President of the Corporation and a managing partner of the Partnership. All three defendants were charged with one count of bid-rigging in violation of Section 1 of the Sherman Act (15 U.S.C. 1). In addition, petitioners were charged with two counts of making false and fraudulent statements (18 U.S.C. 1001), and all three defendants were charged with four counts of mail fraud (18 U.S.C. 1341). Pet. App. A77-A91. On March 12, 1986, a jury convicted petitioners of the Sherman Act violation and on one of the false statement counts. On May 8, 1986, petitioner Philpot was sentenced to three years' imprisonment for each conviction, with the sentences to run concurrently. In addition, he was fined $100,000 for the Sherman Act violation and fined $10,000 for the false statement. The Corporation was fined $500,000 for the Sherman Act violation and $10,000 for the false statement. Pet. App. A105-A108, A127.

1. With respect to the Sherman Act count, the indictment charged that beginning "at least as early as July 1978, and continuing thereafter at least through February 1982" petitioners and their co-conspirators engaged in a conspiracy "to submit collusive, noncompetitive, and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority for the award of highway construction projects, some of which were federally funded." Pet. App. A83. The indictment

related that, "[f]or the purpose of forming and effectuating the * * * combination and conspiracy," petitioners and their co-conspirators (1) discussed "the submission of prospective bids on highway construction projects in Oklahoma"; (2) agreed "upon the successful low bidder on highway construction projects in Oklahoma"; (3) submitted "intentionally high, noncompetitive bids, or with[held] bids, on highway construction projects in Oklahoma"; and (4) submitted "bid proposals on highway construction projects in Oklahoma containing false, fictitious and fraudulent statements and entries." *Id.* at A83-A84.

Shortly after the indictment was returned, the government supplied petitioners with a bill of particulars identifying co-conspirators by name and company affiliation, and listing 11 specific projects that were alleged to be part of the bid-rigging scheme perpetrated by petitioners and their co-conspirators. Pet. App. A92-A101. Six weeks before trial, the government served an amended bill of particulars, deleting one project from its earlier list and specifying six of the previously identified projects that would be presented as evidence of petitioners' participation as well as four of the previously identified projects that would be mentioned during witnesses' testimony to explain the witnesses' participation in the conspiracy. *Id.* at A103-A104.

At trial, several witnesses representing Oklahoma's major highway contractors testified about the conspiracy and petitioners' involvement in it. Pet. App. A57-A67. Those witnesses established that petitioner Philpot, on behalf of the Corporation, rigged numerous bids. On appeal, petitioners "concede[d] the sufficiency of the evidence for a conspiracy concerning" three highway construction projects. *Id.* at A64.

2. The court of appeals affirmed. It held that the indictment was sufficient because it properly set forth the essential elements of the Sherman Act offense. The court

ruled that the indictment was not required to enumerate specific rigged highway projects or name co-conspirators. Pet. App. A7-A17. Judge McKay dissented on that issue. *Id.* at A38-A50. The court also held that the sentences were lawful because they were within the limits provided by statute and there was no evidence that the district court had "imposed sentence mechanically or failed to consider all the materials submitted in mitigation." *Id.* at A37.[1]

ARGUMENT

1. Petitioners contend (Pet. 10-23) that, with regard to the Sherman Act count, the indictment's lack of specificity violated the Fifth and Sixth Amendments. The court of appeals correctly held, however, that the indictment was not unconstitutionally vague.

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). See also *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962). The indictment in this case satisfied those criteria. It contained the elements of the Sherman Act offense—a single conspiracy to rig bids

[1] The court of appeals also rejected petitioners' arguments concerning the Speedy Trial Act (Pet. App. A17-A34); it refused to consider other arguments because petitioners had failed to designate relevant portions of the record (*id.* at A7-A8 & nn. 1 & 3). In response to petitioners' petition for rehearing, the court agreed to receive and review additional parts of the record. The court then rejected various arguments by petitioners, including claims that co-conspirators' statements were improperly admitted (*id.* at A56-A62) and that there was an impermissible variance between the indictment and the proof (*id.* at A63-A67). Petitioners do not renew any of these additional arguments in this Court.

on highway construction projects. It apprised the defendants of the specific charges they were required to meet – charges regarding their conduct in connection with the agreement to rig bids on proposals submitted to the Oklahoma Turnpike Authority and the Oklahoma Department of Transportation between July 1978 and February 1982. And it protected the defendants against subsequent prosecution for the same offense; petitioners do not argue to the contrary.

Petitioners' contention that the indictment merely "track[ed] the statutory language" (Pet. 12) and left "the identity of the conspirators, the method, time, place and nature of the conspiracy totally unspecified" (Pet. 13) is unfounded. The court of appeals correctly noted that the indictment "did more than track the statutory language; it described a conspiracy in restraint of trade." Pet. App. A17 (footnote omitted). As the court of appeals explained, the indictment specifically described the time of the conspiracy (July 1978 through February 1982); the place of the conspiracy (the Western District of Oklahoma); the means of the conspiracy (an advance agreement to establish the low bid on highway construction projects); and the effects of the conspiracy (a lessening of price competition in the highway construction industry). *Id.* at A10, A80-A84.[2]

Petitioners place extensive reliance (Pet. 10, 20-22) on *Russell* v. *United States*, 369 U.S. 749 (1962). In *Russell*, this Court found an indictment deficient because it did not identify, in a prosecution for a refusal to answer questions at a congressional hearing, "the subject under inquiry" (*id.* at 766); pertinency to the subject under inquiry was "the

[2] Petitioners are correct that the indictment does not identify the co-conspirators, but there is no constitutional or statutory requirement that an indictment identify co-conspirators. *Rogers* v. *United States*, 340 U.S. 367, 375 (1951). See also *United States* v. *American Waste Fibers Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987); *United States* v. *Kramer*, 711 F.2d 789, 796 (7th Cir.), cert. denied, 464 U.S. 962 (1983).

very core of criminality" under the charging statute, and the subject of the inquiry was thus "central to every prosecution under the statute." *Id.* at 764. As the court of appeals concluded, however, the "indictment in this case is light years away from the indictment in *Russell*" because "the core of criminality under § 1 of the Sherman Act is conspiracy in restraint of trade," and the indictment specifically "describes this particular conspiracy." Pet. App. A14-A15. Petitioners fail to point to any element of a Sherman Act offense, or a comparable "core of criminality," that was not adequately identified in the indictment.

Petitioners similarly suggest (Pet. 10, 12, 20) that the decision in this case conflicts with other court of appeals decisions, including some of the Tenth Circuit's own precedents. Petitioners do not establish, however, any difference in the governing legal standard; the decisions cited by petitioners merely address the validity of particular indictments on their specific facts. Consistent with the standard applied by other circuits and by the Tenth Circuit itself, the indictment in this case adequately apprised petitioners of the charges against them.[3]

Proceeding from the erroneous assumption that the indictment was "vague" and "open-ended" (Pet. 13), petitioners claim that the purported vagueness prejudiced them because it permitted the introduction of otherwise inadmissible co-conspirator statements. Pet. 13-14. This objection, however, concerns the breadth of the charged conspiracy, not the specificity of the indictment. The court of appeals, moreover, correctly concluded (in a part of its judgment that petitioners do not challenge) that the admission of

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[3] To the extent that petitioners' claim rests on a contention that the Tenth Circuit's decision does not comport with its own precedents, moreover, the claim of an intra-circuit conflict is not a basis for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

the co-conspirators' statements was proper because the admitted statements were made in furtherance of the conspiracy that petitioners had joined. Pet. App. A56-A62. Having failed to prevail in a direct challenge to the admissibility of the co-conspirators' statements, petitioners do not provide an adequate basis for challenging the admissibility of the statements under the rubric of vagueness.

Finally, petitioners contend that the purported vagueness of the indictment prejudiced them because it broadened the charges against which they were required to defend. Pet. 14-15. Petitioners suggest that the government should have been required to enumerate specific highway projects in the indictment. Pet. 15. As the court of appeals concluded, however, such an enumeration was not required, because an agreement to rig bids is itself a violation of the Sherman Act, and no further overt act need be alleged or proved. Pet. App. A15 (citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n. 59 (1940)). In view of the bill of particulars, moreover, petitioners cannot claim that lack of specificity in the indictment led to unfair surprise or otherwise prejudiced their efforts to prepare a defense.[4]

2. Petitioners also contend (Pet. 23-29) that their sentences for the Sherman Act violations do not comport with the Eighth Amendment. They maintain that the three-

[4] Petitioners suggest that the court of appeals' reference to the bill of particulars is an impermissible attempt to save a "defective indictment" (Pet. 21-22); on the contrary, as the court of appeals observed (Pet. App. A13), the bill of particulars here served its traditional function of furnishing additional details regarding the charges in an entirely valid indictment. *United States* v. *Debrow*, 346 U.S. 374, 378 (1953). Similarly, petitioners erroneously contend that the failure to limit the indictment to the bill of particulars injects uncertainty about the basis for the grand jury's indictment (Pet. 21); as noted, the bid-rigging agreement charged in the indictment was itself the Sherman Act violation on which petitioners were indicted, tried, and convicted. See Pet. App. A69.

year sentence for petitioner Philpot (the maximum permitted under the statute) and the $500,000 fine for petitioner Corporation ("one half the maximum" permitted by the statute (Pet. 23)) are unconstitutionally disproportionate to the violations.

Petitioners' reliance on the analysis in *Solem* v. *Helm*, 463 U.S. 277 (1983), is misplaced. In *Solem*, this Court held that a sentence of life imprisonment without possibility of parole for the crime of uttering a $100 false check, under a recidivist statute that did not take into account the nature of the prior criminal convictions, was "significantly disproportionate" to the offense and thus violated the Eighth Amendment. 463 U.S. at 303. In reaching that conclusion, the Court considered the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 292.

The *Solem* analysis does not lead to a conclusion of disproportionality in this case. The first *Solem* factor is the gravity of the offense and the harshness of the penalty. Petitioners recognize that price-fixing is an extremely serious crime. Pet. 25. A three-year sentence and a corporate fine, furthermore, are far less harsh than, for instance, life imprisonment without possibility of parole, the penalty at issue in *Solem*.[5] Indeed, petitioners apparently recognize that the maximum three-year sentence is appropriate for some Sherman Act violations, but they claim that imposition of a maximum sentence requires a finding of special "factors" in

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[5] Petitioners fail to point out that petitioner Philpot's three-year sentence for the Sherman Act violation is to run concurrently with his three-year sentence for the false statement; petitioners do not challenge the concurrent three-year sentence for the false statement.

order for it to be valid. Pet. 25-26. *Solem* imposes no such requirement.[6]

Similarly, petitioners fail to establish that the other two factors of the *Solem* analysis—the treatment of other convicted defendants in the same jurisdiction, and the treatment of others convicted of the same crime in other jurisdictions—are satisfied. Petitioners argue, for instance, that Ray Broce (an unindicted co-conspirator in this case, Pet. App. A100) received only concurrent two-year sentences for Sherman Act violations and that Broce Corporation (also an unindicted co-conspirator, *ibid.*) received a corporate fine "only one-third higher" than petitioner corporation even though it had greater assets than petitioner Corporation. Pet. 26-27; see also *United States* v. *Broce*, 109 S. Ct. 757, 760 (1989) (describing sentences imposed on Broce and Broce Construction). These are far from the kinds of sentencing disparities that would give rise to Eighth Amendment violations, even if they were coupled with incongruities between the harshness of the sentences and the nature of the offense.[7]

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[6] In the capital punishment context, this Court has recognized that a proportionality challenge premised only on a comparison with others convicted of the same offense is "of a different sort" from a proportionality challenge premised on a claim that the punishment is inherently disproportionate to the offense. *Pulley* v. *Harris*, 465 U.S. 37, 43 (1984). See also *McCleskey* v. *Kemp*, 481 U.S. 279, 306 (1987).

[7] Petitioners also suggest that they have been penalized "for having stood trial" (Pet. 28) because the evidence at trial, the pre-sentence report, and various character letters supported "maximum leniency" (*ibid.*). A sentencing court's exercise of discretion in determining the proper sentence (before the advent of the current sentencing guidelines, as in this case) was generally unreviewable, except for specified infirmities. See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424, 431 & n. 7 (1974). As the court of appeals correctly found here, the district court's exercise of discretion contained no such infirmities. Pet. App. A36-A37.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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